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No. 106

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In The United States
Supreme Court

OCTOBER TERM, 1930

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE APPELLEE

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OPINIONS BELOW

This case comes before the Court on certificate from the United States Circuit Court of Appeals for the Ninth Circuit. The United States District Court for the District of Arizona rendered no opinion.

JURISDICTION

Jurisdiction is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts of the case, and the two questions certified by the United States Circuit Court of Appeals for the Ninth Circuit are correctly stated in the brief for the Collector. However, we desire to make this further statement and explanation of the issues involved.

This is one, the fourth on the docket of the Court, of four test cases, designed to determine the right of husband and wife in the States of Washington, Texas, Louisiana and Arizona, respectively, to divide between them community income and each return one-half thereof, for federal income tax purposes. The history of the controversy as a whole, and the course of events leading up to these test cases, is fully set forth in the joint brief filed on behalf of the four taxpayers. We will here advert only to the situation as it peculiarly affects the Arizona taxpayer.

Arizona was one of the states to which the opinion of the Attorney General of the United States, of February 26, 1921, was expressly directed. Pursuant to that opinion, and Regulations of the Treasury Department based thereon, husbands and wives domiciled in Arizona, have ever since been making

separate returns of their respective shares of community income. As will be seen from the joint brief, and consideration of the three preceding cases, disturbance of this situation was precipitated by the decision of this Court in Robbins vs. United States, 269 U. S. 315, holding that the wife's interest in the community income under the system in force in California was not substantial enough during the existence of the community to entitle her to return separately half of it as her income. Following that decision, the Attorney General rendered his further opinion, under date of July 16, 1927 (35 Opinions of Attorney General, 265), in which he expressed doubt as to what conclusions the courts might reach with respect to the state of the law in the other community property states, concededly different than that of California.

Throughout this controversy, we in Arizona have taken this 1927 opinion of the Attorney General as definitive of the contention of the federal government as to Arizona income taxpayers and the issues here involved. This opinion was rendered a year and a half after the decision in the Robbins case, and after the questions involved had been exhaustively briefed by counsel for the respective community property states. It represented, we were led to believe, and still feel, the result of a most exhaustive investigation of the entire controversy, as affecting the community property states other than California. Further reference to this opinion will be made in our argument, but at this point, in stating the case,

we desire to make use of the following language of the Attorney General, contained in his opinion of July 16, 1927:

> "The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless that share belongs to her. Neither the opinions of the Attorney General nor the rulings of the Treasury Department have been based on any interpretation of the Acts of Congress. The nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal Courts to accept the decisions of the State Courts construing the statutes creating the interest and to determine from the statutes and decisions of the State Courts the intrinsic nature of that interest."

Pursuant to this opinion, and the resulting action of the Treasury Department, a representative Arizona taxpayer initiated this case. Its purpose was, and is, to determine, from the Arizona statutes and decisions, to whom community income in this State belongs. The issue is clearly confined to the deter-

mination of the "intrinsic nature of a wife's interest in the community income."

SUMMARY OF ARGUMENT

Our fundamental proposition is, of course, that the wife, in Arizona, owns one-half of all community property and, accordingly, one-half of the community income, as it accrues. In urging this proposition, which seems to us quite elementary, we are not compelled to resort to "adjectives used by State courts in an effort to describe the nature of the wife's interest," against which the Attorney General warned in his 1927 opinion. We have to advance in support of our position a basic statute in force for more than fifty years; and while there is no such volume of decision in Arizona as exists in the older and more populous states, the Supreme Court of Arizona has clearly and accurately stated the essential nature and extent of the respective interests of the spouses, and set forth with precision the various incidents and attributes of the community property system as it has always prevailed in Arizona. As distinguished from that for the Collector, our argument will be directed largely to the basic nature of community property rather than the incidents of the system; to what it is, rather than how it necessarily operates because one spouse is a woman.

We will show the Court, further, that community property, as known in Arizona, is something more than a law; that it is an institution. That it is not

fiction, but fact. And that the present controversy is very largely the result of superficial examinations of our property system by those to whom it is strange and, accordingly, non-existent. We will point out, in our argument, the several respects in which the brief for the Collector offends in this respect. It must be apparent to this Court that this fundamental law of property, existing as it has in seven states since their founding, is a thing of substance, and worthy of a full and fair analysis for what it is—not what its *necessary* limitations may be.

Insofar as it treats of the state of Arizona law, the brief for the Collector is pointed, solidly, to those incidents and appurtenances of the system which can be held out as limitations of the wife's title to her one-half of the community property. In the summary of their argument, counsel for the Collector say:

> "The question, therefore, is not whether the husband or wife has a 'vested' or 'expectant' or 'legal' or 'equitable' title to the community property under the laws of Arizona, but what rights of dominion and enjoyment he or she may exercise."

The argument then proceeds to the point, not of who owns the property, but to what extent each owner exercises his rights of ownership and enjoyment. The Government says, in effect: "By your law, the wife owns one-half of all that the marital community acquires, but since she cannot do with

it everything that the husband does with his half, she cannot be said to own it at all." In short, the argument is that because we have reconciled our community property system to the fundamental function of the marital community, and made it workable, we have destroyed it.

The Supreme Court of Arizona has fully answered this argument in the case of La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426, which stands as our leading case on all community rights and obligations. This case, in a full exposition of community property, lays down the rule for Arizona that the titles of husband and wife are in all respects equal. It recognizes that the wife in her status is as much an agent in the acquisition as the husband. And finally, it disposes of the "dominion and control" argument by pointing out that the powers of the husband are not in recognition of any superior right or title, but by virtue of an agency for which he is deemed better qualified than the wife.

ARGUMENT

I

The Wife in Arizona Has a Present Vested Title in Community Property Equal in All Respects to That of the Husband, and Community Income Vests Equally Between Them As It Accrues.

The Arizona law of the rights of married persons in property is contained in Chapter III, Title 32,

Revised Statutes of Arizona, 1913, Civil Code. The relevant portions are correctly set forth in the appendix to the brief for the Collector. The statute provides what shall be deemed the common property of the husband and the wife and what the separate property of either, and prescribes the respective rights of the spouses. Paragraph 3850, defining community property, provides:

> "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived, or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife * * * ."

In the lower courts, government counsel contended that this language, as interpreted by Arizona decisions, conferred upon the wife no other or higher status than that of the California wife under the statutes and decisions construed by this Court in the Robbins case. This position appears now to be abandoned. Title II of the argument in the Collector's brief in this Court maintains only that the wife's interest "is not such that she should be permitted to report one-half of the community income in her return." Which, of course, begs the question of what the wife's interest really is.

To the superficial inquirer, embarking with the idea that community property is a mere fiction, the property rights of the respective spouses, under the

above statute, may possibly be obscure. The statute, of itself, is not complete; for instance, in the outstanding respect that the shares of the spouses in the common property are not prescribed. Obviously, this is because the statute set up no new or overturning system of property holding, but merely perpetuated a system, native to the soil of these states, and, in Arizona, perpetuated the Spanish law of community as it had endured for centuries. Viewed in this light, the laborious efforts of government counsel to discover a "distinctive philosophy" of Arizona community property, and to build it up backwards from its application to everyday transactions of the marital community, are understandable.

In the La Tourette case, supra, the Supreme Court of Arizona has most plainly announced what community property is, and how it operates to facilitate, rather than impede, the function of the family in which the State is so vitally interested. This outstanding decision is hastily disposed of by government counsel, who cite it in their brief as authority for the proposition "that the equitable interests of the husband and wife are equal." As will be seen, it nowhere deals with equitable interests. When the federal government undertakes to discover, for its purposes of taxation, the owner of the wife's share of Arizona community property, it seems to us the answer is to be found in the following language of this La Tourette case:

"The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and makes her an equal factor in the matrimonial gains. It recognizes that property acquired during marriage by community funds *or the labor and industry of either spouse,* except what is earned by the wife and her minor children while she has lived or may live separate and apart from the husband, *is the common property of the husband and wife.* All that either the husband or wife or both may acquire during the existence of the marriage, otherwise than is specifically excepted, is an acquest of the community, and the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property. It recognizes that the wife in her station is as much an agency in the acquisition as the husband, and is entitled to just as great an interest. It is altogether fitting and proper that woman should be thus esteemed by the law in fixing her status if she is to be considered in fact as well as in theory an essential factor in the economy of the marital community. It is true that during the coverture the personal property belonging to the community may be disposed of by the husband only; but it is equally true that no sale or encumbrance of the real estate may be made by the husband without the consent of the wife. She must join in all deeds

and mortgages affecting real estate, except unpatented mining claims." (Italics ours).

If it be essential that Arizona here commit itself to a "distinctive philosophy" in respect of its community property, one is here supplied. The wife has a title to her share of the acquests of the community equal to that of the husband to his. If comparison with another relationship be desired, it is supplied in the later case of Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175, where the wife's title is described as a "vested legal one, the same as the interest of any other partner in partnership property."

We believe the foregoing discloses sufficiently the state of the Arizona law as it prescribes the title of the wife to her share of the community property. It seems not seriously to be controverted in the government brief, that she is the owner of one-half of such property and, accordingly, the community income, as it accrues. But it is there asserted, that upon the authority of the Robbins case and Corliss v. Bowers, 281 U. S. 376, the income of the wife may nevertheless be taxed to the husband because he exercises, it is alleged, "all the substantial rights of dominion and enjoyment." The rights and powers of the wife, in respect of her half of the community income, are variously described as "formal", "unimportant" and "technical". Apparently, the argument is designed to place us in the position of advancing a technical argument to evade taxation. What could be more technical than the contention

which concedes a legal title in the wife, yet for the purposes of this case considers not the fact or substance of such title, but only the restrictions necessarily surrounding her enjoyment of it? It is the outstanding example of the failure of government counsel to comprehend the basic nature of community property.

II.

The Powers of the Husband Over Community Property are in Recognition, Not of a Superior Interest or Title, But of the Necessity of Subordinating the Exercise of Property Rights to the Family Function.

The brief for the Collector is almost entirely devoted to the respects in which the husband's and the wife's exercise of control over the community property are not equal. The conclusion is reached that the husband in Arizona has very nearly all of the present power. With one important exception, the Arizona decisions are considered. And while in general, the substance of community property is not drawn from the cases, the incidents of the system are in most cases fairly set down. There can be little dispute as to what powers of control and disposition are exercised respectively by the husband and the wife in Arizona; and in lieu of a discussion of the many cases, we will schedule all of the various rights, restrictions and other incidents of the system, including those treated in the brief for the Collector.

1. Community property includes all property acquired during coverture, except by gift, devise or descent and the earnings of the wife while living apart.

Par. 3850, R. S. A., 1913, C. C.

2. It does not include income from the separate property of either spouse.

Par. 3848, R. S. A., 1913, C. C.

3. In any doubtful case, acquests during coverture are presumed to be community.

Malich v. Malich, 23 Ariz. 423, 204 Pac. 1020.

Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175.

4. The interest of each spouse in one-half of the property is a vested legal one, the same as the interest of any other partner in partnership property.

La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426.

Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213.

Cosper v. Valley Bank, supra.

Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 282.

Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865.

Schofield v. Gold, 26 Ariz. 296, 225 Pac. 71.

5. The husband has the management and control and right of disposition of all community property during coverture; provided that no sale or encumbrance of real estate may be made without the consent of the wife.

Par. 3850, R. S. A. 1913, C. C.

Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213.

6. The husband's right of control and disposition is subject to the restriction that it may not be exercised to defraud the wife of her one-half, and the remedy of the wife for a disposition in fraud of her rights or to defeat her interests, is found in the general law of agency.

Gristy v. Hudgens, 25 Ariz. 339, 203 Pac. 569.
La Tourette v. La Tourette, supra.
Cosper v. Valley Bank, supra.

7. The husband is a necessary party to all suits affecting the community property.

Benson v. Hunter, 23 Ariz. 132, 202 Pac. 233.

8. The community property is liable for all community debts contracted by the husband during marriage, and by the wife for necessaries; but is not liable for the separate debts of either spouse, incurred either before or during coverture.

Par. 3854 - 3855, R. S. A. 1913, C. C.
Cosper v. Valley Bank, supra.
Forsythe v. Paschal, supra.

9. Each spouse has unlimited testamentary power over his or her half of the property; and in the absence of testamentary disposition, the property passes to the descendants of the deceased spouse.

Par. 1100, R. S. A. 1913, C. C.
Pauley v. Hadlock, 21 Ariz. 340, 188 Pac. 263.
Wilson v. Sullivan, 24 Ariz. 124, 206 Pac. 222.

10. In divorce proceedings, the Court may, "in addition to the division of the community property of the parties, or in lieu thereof, direct the husband to pay to the wife such amounts as may be necessary for support, etc. * * *".

Par. 3869, R. S. A. 1913. C. C.

11. Each spouse may convey to the other, by deed executed by him or her alone, his or her interest in community real property.

> "This court has said in several opinions that a deed from the husband to the wife conveying his interest in the community real estate is valid, and, since it was the purpose of the legislature in the enactment of the community property law as it now stands to place the husband and wife upon an absolute equality so far as the alienation and encumbrance of community real estate is concerned, it follows logically and necessarily that she may convey her interest in such property to him, for, even though he is empowered to dispose of the common personalty during coverture and to contract community debts for which the community property may be liable, he is given no greater right, no fuller power to deed or mortgage community real estate, than she. To hold that he can convey to her, but that she cannot convey to him, finds no support in a statute intended to place them upon an equal footing in this respect." Schofield v. Gold (supra) p. 305.

Government counsel, in their zeal, have seized upon those of the above provisions which they could construe as restrictions upon the wife's use and en-

joyment of her share of community property, and proceeding therefrom, have sought to negative the title positively conferred upon her by the statutes and decisions above cited. Had they, instead, started with the title conferred upon her by our statute, which, if they found it difficult of definition, is in any event equal to that of her husband, the restrictions placed upon the wife would readily have reconciled themselves. That the powers of the spouses over the common property are not equal is quite apparent. But to say that because they are not, half of the property cannot belong to the wife, is to indulge that misconception of the community property system which this Court long ago cleared away in Warburton v. White, 176 U. S. 484:

> "It is a misconception of that system to suppose that, because power was vested in the husband to dispose of the community property acquired during marriage, as if it were his own, therefore by law the community property belongs solely to the husband. The conferring on the husband of the legal agency to administer and dispose of the property involves no negation of the community, since the common ownership would attach to the result of the sale of the property. * * * This right being vested in him not because he was the exclusive owner, but because by law he was created the agent of the community."

In very similar terms, the Supreme Court of Arizona has defined the nature and extent of this agency with which the husband is clothed:

> "The law, in giving this power to the husband during coverture to dispose of the personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and necessary in business transactions affecting the personalty to have an agent of the community with power to act. So it has clothed the husband with this agency, deeming him the best qualified for the purpose, but limiting such agency to the personalty and during the period of coverture. And this agency to dispose of the community personalty may not be executed by the husband to defraud his wife, for in one way or another she would have a remedy for a disposition by the husband in fraud of her rights, or made with the intent and purpose of defeating her interest. And further, this power of the husband to dispose of the personal property of the community is limited to the period of coverture, and does not extend to his disposal thereof by will, but he is restricted in the disposal by will to his one-half interest."
>
> La Tourette v. La Tourette, Supra.

In the light of this language, it is readily seen that the federal government, in its presentation of the Arizona community property system, has simply reversed the cart and the horse. We do insist that one-half of the property belongs to the wife, for taxation as well as any other purpose, but at the same

time, we do concede that the primary interest of the State in the marriage status is the protection and preservation of the family as a unit, and of the minor children. Accordingly, the State has provided, for administrative purposes, an agency by and through which the community may function. As this Court recognized in the Warburton case, supra, the conferring on the husband, as the better qualified, of such an agency, involves no negation of the wife's title to her half of the property. If for no other reason, this is so because her ownership attaches throughout any transaction to which the agent may subject the property.

Further consideration of the Arizona decisions treated in the Collector's brief seems unnecessary. They are there cited to the point that the powers of the spouses are unequal, which cannot be denied. We think the attributes of the Arizona system, as listed above, comprise a fair statement of what community property is in this State, and how it has been reconciled to the functioning of the family. There is one case, however, not cited in the opposing brief, which gives additional force to our argument upon this point. Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865, involved an attempt of a creditor to subject community property to payment of the wife's debt contracted before marriage. An ingenious argument was advanced by the creditor, but the Court held that the community estate may not be subjected to the individual debts of either spouse contracted

before marriage any more than those contracted after marriage.

In the course of the opinion, the Court further stated the general nature of the marital relation in Arizona, affirming and supplementing what has been quoted, supra, from the La Tourette case. Particularly, there is stated the analogy of the marital status to that of a partnership, and the primary nature of the State's interest in the family unit. We think the following language from this Forsythe decision, when considered with that of the La Tourette case, fully meets the government's contention, as we understand it:

"Under our law, therefore, the status of marriage is more analogous to that of a partnership than to any other status known. It has, however, at least one important quality not possessed by the ordinary partnership. Both, it is true, arise out of a voluntary contract, and in both the individual rights of the parties in the partnership property are subordinate to the rights and liabilities of the partnership. In the ordinary partnership, however, the state as such is not interested. The partners may dissolve it at will, subject, of course, to the legal consequences of the dissolution. Marriage, however, as is well stated in Hilton v. Roylance, supra, 'is regulated * * * and can be dissolved only through the sovereign power of the state, whenever justice to either or both parties or the welfare of the public demands it. * * * It is apparent that many of the rules of law applicable to the mar-

riage status differ widely in material respects from those applicable to mere civil contracts.'

"If marriage were no more than an ordinary partnership, with all its rights and liabilities, the course to be followed in the case at bar would be clear. Plaintiff, on obtaining his judgment against defendant Gail M. Paschal, would have a right to demand that the partnership be wound up, the property divided after the payment of the partnership debts, and the interest therein of the judgment debtor subjected to execution. If we attempt to apply this rule to the marriage status, it is apparent that it would destroy to a great extent the very thing the desire to protect which led the state to assume its control over marriage. The state's principal interest in the marriage status is the protection of the family as a unit, and of the minor children. The whole history of our legislation in Arizona, as well as elsewhere, shows this to be true. There are few things which would do more to destroy the solidarity of family life and the proper maintenance of the children of the marriage than the possibility that the community estate and earnings primarily intended by the state for this protection could be diverted from that purpose to satisfy debts in no way connected with the family."

Having established, at this point, the "intrinsic nature of the wife's interest in community property and income", and that it is not diminished by the agency conferred upon the husband, it remains only to be pointed out that the federal government is

bound by the state of the law in the respective states as respects what is property and income, and in whom title thereto is vested. This phase of the question is not considered in the government brief in this Arizona case, but in the corresponding brief in the Washington case (Poe v. Seaborn, No. 15), it is conceded that Congress has failed to make any provision in the Federal Revenue Acts, dealing with the determination of the person to whom income belongs in any of the states. This Court has repeatedly held that in this situation, it will follow State statutes, as interpreted by the State courts:

Warburton v. White, 176 U. S. 484.
Washington v. Miller, 235 U. S. 422.
Hines Trustees v. Martin, 268 U. S. 464.

We submit, further, that this line of reasoning effectively answers any argument which can be fashioned from the Corliss case. That decision quotes the provision of the 1924 Revenue Act expressly covering questions anticipated to arise in the case of revocable trusts. Although no analogy exists between trusts and community property in Arizona, the silence of Congress in the latter case clearly leaves the Treasury Department no recourse but to the Arizona law in seeking the "individual" to be taxed. As has been shown, successive Attorneys General have so ruled, throughout this controversy.

III.

References to Argument In Joint Brief

As stated at the outset, this brief is designed to develop the state of the Arizona law. Our effort is here directed primarily to answering the question put by the Attorney General in his opinion of July 16, 1927, respecting the intrinsic nature of the wife's interest and title in community income; for not until receipt of the brief for the Collector in this Court, was the Arizona taxpayer directly confronted with any other or further contention.

Since the various other questions, arising largely out of differences of interpretation of the Robbins decision, are common to the four cases affecting Washington, Louisiana, Texas and Arizona, they have been treated very fully in a joint brief, submitted herewith, and which we desire to have considered as a part of Arizona's case. Of the matters there dealt with, those respecting construction of the Revenue Acts, both intrinsically and extrinsically, are of course equally applicable to the four cases. Without here duplicating the argument fully developed in the common brief, we will consider only those aspects of it which in our view, are particularly applicable to the case in Arizona.

In the government brief, the point is stated, without argument, that the Revenue Act of 1926 should be construed, and applied, if possible, so as not to give married taxpayers residing in the community

property states an undue advantage over married taxpayers residing in other states. We think it significant that this proposition has not been analyzed in the opposing brief. For the first step would have been to ascertain upon what basis "the individual" to be taxed is determined in the other states referred to. If this question were propounded to any federal official charged with administration of the revenue acts, it cannot be doubted that he would answer that income is taxed to the husband in such states because by the law of those states he is the legal owner of it. Certainly that would be the answer of the present Attorney General, in conformity with his 1927 opinion.

Obviously, uniformity is not to be achieved by technical avoidance of the force and effect of the fundamental property system of certain of the states. All manner of difficulty is encountered in pursuance of any such policy. For instance, how is the test of "substantial control" to be applied in Common Law States, to the property or income conveyed by the husband to the wife? Is this to be treated, for income tax purposes, differently than corresponding property or income which, by operation of Arizona law, vests in the wife at the moment of acquisition? Or, taking the case of earnings of the wife, a factor of increasing importance, is this income to be taxed and surtaxed to the husband in Arizona, and not in the other states? Moreover, if the policy of taxing the husband upon the wife's half of the income by reason of his agency to administer it, is carried to

its logical length, and applied to other managing agents or partners, fresh complications, never intended, but expressly repudiated, by Congress, are at once encountered.

If this question of uniformity be viewed as one of equable adjustment between residents of the two classes of States, then there necessarily are to be considered the practical results of community property which tend to the disadvantage of the husband. Uniformity in the constitutional sense, is discussed in the joint brief, and its practical aspects will have been fully presented in consideration of the three preceding cases. The close similarity of the Arizona system to that of Washington, as commented upon in Cosper v. Valley Bank, (cited supra), is noted in the government brief. Clearly, upon the whole case, uniformity, in application of the income tax to Arizona, requires recognition of the wife's title to one-half of the community income, as prescribed by the statutes and decisions of this State.

Another proposition stated, but not argued, in the government brief, is that an assessment of income tax against the wife might be difficult of collection. Presumably, the failure to argue the point is by reason of the inability of government counsel to discover any instance, during the many years the practice of filing divided returns has prevailed, in which such imaginary difficulty has arisen. The leading Arizona cases from which we have quoted clearly establish the status of the tax as a community debt. No

difficulty is encountered in the collection of community debts in general, and no reason exists to anticipate any in the way of the United States. Upon the assessment of the tax, it becomes the duty of the husband, as the managing agent of the community, to pay it from community funds. In the absence of such payment, the government unquestionably has recourse to the several remedies available to it under the revenue acts.

In conclusion, we desire to refer briefly to the argument in the joint brief respecting the Robbins case, and show its particular application to the Arizona situation. We contend, of course, that if the holding of the Robbins case be now taken as applicable to the Arizona taxpayer, it must be by virtue of an analogy between the respective titles of the wife in the two states. In the California case, this Court expressly recognized that in at least two of the community property states, the wife has vested rights in respect of half the community property, as distinguished from "a mere expectancy" in California. Apparently, the test laid down was whether Warburton v. White, supra, and Arnett v. Reade, 220 U. S. 311 would be followed in the state under consideration. If this be the test, the complete answer is furnished by our La Tourette case, which not only follows, but cites with approval, Warburton v. White and Arnett v. Reade.

But we are not unaware that other and further contentions are made as to the extent of the holding in

the Robbins decision. As to these, we submit first, that they are contrary to any reasonable interpretation of the Revenue Act, in the light of its history and executive construction. And secondly, we submit that no reason which can be assigned for the Robbins decision can be made applicable to the facts of this Arizona case. We have already shown that the rule of Roberts v. Wehmeyer, 191 Cal. 601, from which this Court, in the Robbins case, determined the law of California, is not the law of Arizona. To the same extent, we believe our exposition of the Arizona system, as hereinabove contained, shows that both the nature and the extent of the powers conferred upon the husband are so fundamentally different in the two states, that any effect which can be ascribed to the final paragraph of the Robbins decision has no application to Arizona.

In its enumeration of the powers of the California husband, the Robbins decision states first that "he alone has the disposition of the fund." As to real property, the Arizona husband may neither sell nor encumber without the consent and joinder of the wife. As to personal property, his power of disposition is that of an agent, and as shown by the La Tourette case, his responsibility is likewise that of an agent. The difference, in this respect, in the two states accurately reflects the difference between Roberts v. Wehmeyer and our La Tourette case. What has just been said of the right of disposition, also emphasizes the difference between California and

Arizona in the matter of the wife's redress,—the second element mentioned in the Robbins case.

Neither is it true in Arizona, as pointed out in the case of California, that "the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's." It is elementary in this state that community property may not be taken for the separate debt of either spouse. Forsythe v. Paschal, supra. In California, the rule is otherwise, and the husband, as the owner of the property and income, during coverture, may apply it in payment of his debts, incurred either before or after marriage.

Finally, we have the power of testamentary disposition, and the rule of descent; the outstanding respect in which the situation dealt with in the Robbins case is diametrically opposed to that here under consideration. In Arizona, the wife has full power to dispose by will of her half of the community property, and in case of intestacy, it passes to her descendants, not his.

Clearly, the obviousness of the husband as the target for the shaft is confined to the jurisdiction of California.

CONCLUSION

We respectfuly submit that of the questions certified by the United States Circuit Court of Appeals in this case from Arizona, the first should be answered in the negative, and the second in the affirmative.

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